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Employee Ownership Month Resources

Poster and Press Kit Available to Help with October Celebrations

Employee Ownership Month (EOM) is fast approaching, and The ESOP Association is offering resources to help you celebrate in style and with greater fanfare than ever.

As you prepare for your October EOM events—such as ESOP educational sessions for employees, charitable activities for your community, and visits from your elected officials—don't forget to make use of these valuable resources.

EOM Poster

As it has in years past, The ESOP Association is providing all corporate members with one free copy of the current Employee Ownership Month Poster!

Want more copies—perhaps to share with clients, place in your other locations around the state or country, or to hang in different spaces throughout your building to ensure all employee owners can see them?

No problem! Additional copies of the poster can be purchased by members at a discounted price.

The poster is a great way to generate enthusiasm for employee ownership—especially since it is designed by employee owners! Each year, the Employee Ownership Month Poster Competition attracts entries from across the country. The winning poster is selected by a panel of judges consisting of members and employee owners. Thanks to our judges and to the employee owners at Moody's Co-Worker Owned who designed this year's terrific poster!

(Interested in submitting an entry for the 2020 competition? See the article on page 4 for details.)

Details on obtaining your poster will be shared soon. Get your copy and use it to remind everyone that October is a special time for celebrating a uniquely powerful ownership arrangement.

Press Kit

The 2019 Press Kit is now available for download, exclusively for members of The ESOP Association. The Press Kit provides tips and advice you can use to tell the world about ESOPs in general, and about your particular ESOP company.

Want to learn to use social media to get great online engagement for your ESOP company? Want tips on interacting with the press? Get all this and more from this year's updated kit.

While this highly useful document is perfect for communicating at any time of the year, it can be especially helpful as you prepare your Employee Ownership Month activities. Preparing educational

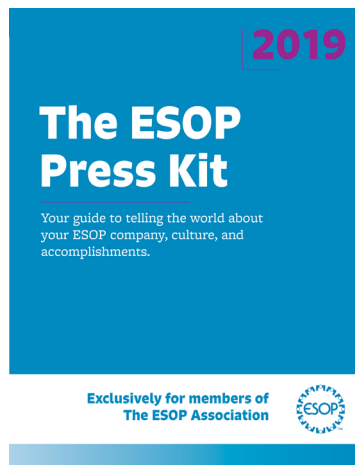
content for employees, interacting with your elected



officials, and participating in community and charitable events are all newsworthy activities—and this document can help you spread the great news.

Feel like these events can't compete with others happening around you? Don't worry about that: Reporters and editors are always on the lookout for positive stories, and your ESOP is a very positive story.

Don't be shy about touting your company, your ESOP, and your employee owners! The perceptions of elected officials, policy leaders, and analysts at key think



tanks are formed one individual experience and example at a time.

Each time you demonstrate the benefits that ESOPs provide, every company and employee owner in our entire community gains from that positive exposure.

Note: In August, the Press Kit was posted on The ESOP Association website and e-mails with links to the updated document were sent to the primary contacts for our corporate members. If you didn't get your document, it's not too late: [Download a copy here](#). (You must first sign in to the website.)

President's Column

There Will Be Even More to Love About Las Vegas This Year

By James Bonham, President and CEO, The ESOP Association

As summer comes to an end and swings into the fall, most people sharpen their focus in sync with the quickened pace of activity that comes with the season. School schedules and sports calendars can drive many schedule decisions. At least they have in my household for the last 15 or so years! And at our businesses, year-end sales targets come into full relief, budget planning for the next year kicks into gear. And for The ESOP Association (TEA), Labor Day's arrival brings with it chapter events and preparation for the most important employee-owned conference of the year: Las Vegas.

This column is not another sales pitch for you to attend, but rather, I wanted to use the space I have in this month's newsletter to highlight the value of the conference for the entire employee ownership community, and to flesh out the significant changes you can expect when you attend.

First-Run Topics, Presented by the Best in the Industry

TEA's annual Las Vegas Employee Ownership Conference and Trade Show has been the gold standard for employee ownership education, professional development, and networking for nearly three decades. This year—like almost everything around TEA these days—our conference is getting quite a bit more than just a facelift.

National conferences all too often can become larger versions of local or regional events, with the same speakers presenting on the same topics. Las Vegas, however, has a well-earned reputation among ESOP executives and professionals as the place to be for the most technical education available, and the greatest value for the time and resources invested. As we formulated this year's event,

keeping that high standard for technical content was a foundational mandate.

ESOP | Report



The Voice of The ESOP Association

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Our professional advisory committees have done an amazing job identifying the most important topics and presentations for our 60 educational sessions. This volunteer-driven, bottom-up, industry-wide process of topic identification and selection is a deeply important service provided by TEA. In fact, it works so well year after year that most members are probably unaware of the work and effort that goes into developing the programming. This first-run programming for Vegas fuels virtually every ESOP conference for the next year—whether it is a TEA conference or not.

TEA's professional advisory committee members—the best of the best when it comes to ESOP and employee ownership advisors—meet multiple times a year, discussing the current issues, trends, and concerns of ESOPs across the nation. If these volunteers actually billed for the time they invested, it would easily rise into the hundreds of thousands of dollars every year.

These professionals distill their ideas and observations into those that are most essential and timely. What makes the final cut, and finds a place in the program in Las Vegas, often represents the first appearance of topics that in turn get replicated by others for the next year or longer. If you want to be ahead of the pack and hear from the industry leaders, or become an industry leader yourself, this is where you need to be.



An Actual Trade Show, Not Just a Few Booths

For 2019, we made a decision to invest significantly in our annual [Trade Show](#). The goal is clear: Bring a much higher value and more enjoyable experience to conference attendees, and provide a greater ROI for those who decide they want to participate in the show by purchasing a booth themselves. The new Trade Show was re-designed by industry leading professionals to become the central hub, the town hall if you will, of the conference.


Right at the heart of the trade show space will be an entirely new Innovation Stage. This new TED-Talk style stage is where the best of employee ownership—professionals and corporate members alike—can present on the topics they choose. We will live broadcast these topics and presentations to our entire membership, and our presenters will be able to post the video on their own sites in the future.

Conference attendees can enjoy the talks, meet with professional advisors in our new lounge spaces, or simply recharge mobile devices throughout the area. We are planning to feature a beer garden where you can grab a complimentary beverage from one of our employee-owned craft brewers, or if you stayed up too late the night before playing poker, you can grab a specialty coffee to get through the day.

National Level Speakers You Won't Get Anywhere Else

As part of the major upgrades, we are also investing heavily to bring the caliber of national speakers you should expect at a national conference with nearly 2,000 high-level attendees every year. Drawing from the same pool of talent used by companies and conferences like Google, Intel, South by Southwest (SXSW), Oprah's X⁴ Conference, The World Economic Forum, and the Aspen Institute, we will use the main general sessions as an opportunity to inspire and transform the way you think and interact with your employees, your customers, and your communities.

As a bonus for our top executives attending the conference, each of these international caliber speakers has agreed to spend a private session in our [Chief Executive Series](#) of sessions where they will share insights and be available for top executives to gain from their knowledge and experience. Even if you are a member of another industry-specific trade association, you won't get this kind of access to top thought leaders.

There are tons of other new features and innovations for Las Vegas this year. I hope to see you all there and hope you can agree that Vegas continues to be the standard against which all others are measured. 

Ownership Advantage

Effective Meetings Can Enhance Your Employee Ownership Culture

By Linshuang Lu, Principal, Praxis Consulting Group Inc.

Meetings often are the bane of our work lives. We groan that we can't get any work done when we spend all our time in meetings. We love to hate them, and yet we haven't figured out how to get rid of them.

In spite of these negative associations, effective meetings are indispensable for building an ownership culture. Meetings can keep employee owners informed and connected, and empower them to contribute ideas and

make decisions that can improve your employee owned company.

Types of Meetings

There is no one formula for determining the right types of meetings for your company. Recurring meetings can be important for strategic thinking, collaboration, coordination, planning, improvement, monitoring, and training. Ad-hoc meetings can be used to problem-solve urgent issues and make decisions as needs arise.

Different types of meetings require different lengths of time. A team of field construction workers may need only a 10-minute daily work coordination meeting, whereas an improvement task force may require a half day to fully explore and discuss an issue.

Company size and geography also influence which types of meetings may work best. A 300 person company spread out across multiple locations may decide to have one bi-annual meeting for everyone, or opt for an annual meeting in which people gather in their own regions. By contrast, a 40-person company in one location might have no problem holding all-staff meetings once a month.

Preparation is Key: Who and Why?

Effective meetings begin before people gather, and start with establishing clear goals. What do you hope to accomplish?

When creating the agenda, think of a goal for each topic. Are you trying to give an update? Do you hope to have a brainstorming discussion? Make a decision?

AACE, EOM Poster Competitions Open

Download the Rules and Start Preparing Your Entry Today

The ESOP Association's competitions for the Annual Awards for Communications Excellence (AACE) and the Employee Ownership Month (EOM) Poster are now open and accepting entries.

Interested in participating? Start by downloading a copy of this year's [entry form](#) and rules, which we have modified in an effort to make entering clearer and simpler than ever. First-time entrants in particular should benefit from the updated descriptions and explanations.

All entrants will want to review the rules to understand the three changes being made to the competitions. Here is a quick look at what is different.

1) Due to space constraints, only winners and runners up will be displayed at the National Conference.

This is a change we had to make last year to improve the experience for all our attendees, and we need to make it again. The National Conference has become so successful—we draw so many attendees and offer so many sessions—that we have outgrown our space in the conference hotel. Making this change provides better traffic flow in multiple areas of the conference, and also enables us to house AACE and EOM Poster entries in a room that can be secured at night.


2) Judges will consider in their evaluation of entries the correct use of Association branded elements. What

is the correct way to use Association branding—such as The ESOP Association logo? Copy and scale it exactly as it appears in the original. Why is this so important? Under copyright law, if we as a community use these items inconsistently, we risk losing legal protection over them.

3) If you would like to have your AACE entry returned to you, please be prepared to pay the shipping charges. For years we have paid the freight to return entries, but these competitions have become so popular that it has become too costly to continue this practice.

As you prepare your entry, ask yourself if you need to include items that want to have returned to your company. If not, you may be able to let us dispose of your display after the conference

and save yourself the cost of shipping.

Download your copy of the new [rules](#) and [entry form](#) today. Be sure to save the entry form to your computer, type in your answers, save the form, and attached it an e-mail sent to media@ESOPAssociation.org. 



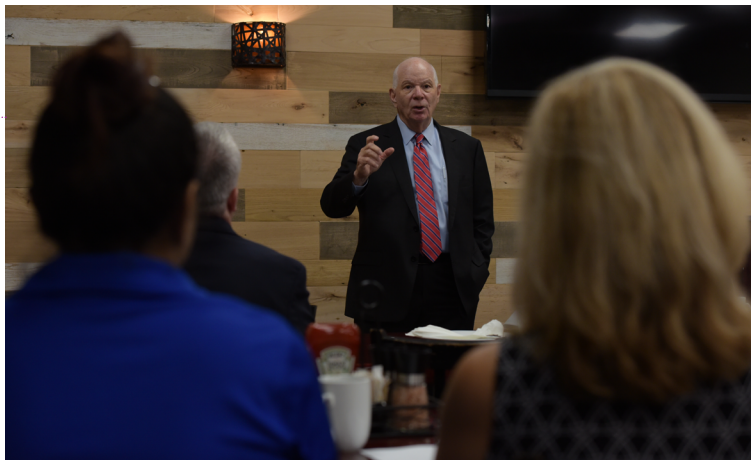
Sen. Cardin Visits Mid Atlantic Chapter

Sen. Ben Cardin (D-MD), a long-time supporter of the ESOP community, and the sponsor of pro-ESOP bill S. 177 in the Senate, visited the Mid Atlantic Chapter during a breakfast meeting on August 23.

Sen. Cardin encouraged attendees to reach out to their elected officials to solicit their support. When asked what might be most effective at persuading elected officials to support ESOPs, Sen. Cardin said some of his colleagues may not be aware of the extremely positive data regarding ESOPs.


“I think they are surprised to learn about the effectiveness,” of ESOPs, Sen. Cardin said. He specifically cited data showing that employee owned businesses withstand tough economic times better than conventionally owned firms.

He also noted that some aspects of ESOPs—such as the amount of equity value employees can accrue and the



ability to diversify their holdings—come as a surprise to some elected officials.

“Bring them to your company,” he said. “Let them know it’s an ESOP and let your workers talk about it.”

Sen. Cardin noted that retirement security was once an unpopular subject—but no longer. “Now, it’s a popular subject,” he said, “so politically this is not a hard sell.” 

For recurring meetings, the agenda can be finalized at the beginning of the meeting by the participants. Alternatively, the meeting leader might present an agenda and then ask participants to affirm the plan or add other topics.

Good planning includes being thoughtful about the people who need to attend, the role they will play, and their authority. Gathering people with the right knowledge, experience, or stake in the issues makes a difference.

It also is important to be clear about how decisions will be made. Will the leader of the group make the final decision, based on input from the group? Will the team make the decision together, based on a majority vote?

Beyond the agenda itself, you might have process goals (i.e. how you hope people will interact during and afterwards). Perhaps you hope to get lots of questions, or for people to feel energized afterward and ready to apply what they learned. The meeting should be designed with the aim of accomplishing these goals.

Design the Meeting

For longer or larger meetings, deliberate design will help you achieve success. This means planning key questions, balancing presentations and small and large group exercises, and figuring out how best to gather and summarize participant contributions.

As a general guide, planning should take as much time as the meeting itself, or even longer if the meeting is complex (such as an all-company meeting with multiple breakouts).

For regular or shorter meetings, a few minutes of planning can make a big difference. Sharing a clear agenda in advance lays the foundation for people to participate. A check-in question can get everyone participating right away.

You also may want to prepare an important question or decide which facilitation techniques to use for an important decision. Some people create a standard agenda with these components for regular meetings.

Empowering Facilitation

A good meeting requires one or more designated facilitators who are responsible for following the agenda, managing discussion, ensuring decisions and key points are documented, and moving conversation to the next topic.

Typically, this role is filled by the formal leader of the group, though it does not have to be. Many companies or groups rotate facilitators for meetings, which allows the leader to participate more fully.

A good meeting requires one or more designated facilitators who are responsible for following the agenda, managing discussion, ensuring decisions and key points are documented, and moving conversation forward to the next topic.

The facilitator, who often is a member of the team or committee, must navigate two roles: individual contributor or leader to the group, and manager of the discussion.

Establishing explicit meeting norms sets shared expectations for the group’s behavior. Many companies use an established meeting norms list for all their meetings.

Common norms include:

- Step up, step back—in which people are encouraged to step up and share their perspective, or step back if they have already spoken quite a bit.

- Be curious and listen.
- Be present.
- No electronic devices, except for emergencies.

We usually want active participation. When people discuss issues, contribute their ideas, and ask questions, they are more likely to feel excited and committed, and the company is more likely to benefit from their perspectives and expertise.

Practical ways to encourage participation range from an easy check-in question to get everyone's voice in the room, to writing responses on a flip chart, to structured facilitation exercises with more opportunities for response (e.g. individual reflection with documentation on post-it notes, paired or small group discussion, or saying things like "We haven't heard from some people for a while; we'd love to hear your perspectives on this topic.")

Good facilitation requires paying attention to people's body language and energy level. Depending on what is happening, it may be necessary to take a break, acknowledge emotion or conflict, or deviate from the agenda.

It can be hard for one person to do all of this, so other team members should be encouraged to pay attention to participant behavior, and speak up if the meeting needs to take a different direction or be refocused.

The facilitator must monitor progress toward meeting goals and make deliberate course-corrections. For instance, if a team needs to make an important decision, but surprising information requires more time to understand, it may be better to deviate from the original agenda.

That being said, meetings often go off on tangents unrelated to the goals at hand. When this happens, the facilitator should refocus the conversation: "We're getting off topic, let's return to the agenda."

If people are fascinated by the tangent, it can be saved for a future conversation: "It seems like this is an important discussion we need to have. Today's meeting is not the right place to discuss; let's save it for next month's agenda." Some groups use a "parking lot" flipchart where these ideas are recorded for later discussion.

Good meetings also have strong closure. The facilitator should summarize key agreements, decisions, and next steps (along with who is responsible for each).

A quick evaluation in which people are asked to identify what worked and what could be enhanced in the next meeting can provide feedback for continuous improvement.

The Follow-Up Makes the Meeting

Sharing meeting notes and reminding people of next steps helps ensure the meeting's decisions are implemented.

For retreats and larger meetings, it can be valuable to have a formal debriefing (yes, there is irony in a meeting to debrief a meeting), where the planners can discuss what worked well and what could be improved, and can document any lessons and changes for the future.

Communicating with those unable to attend the meeting is an often-overlooked follow-up step. This is especially important after important decisions have been made. Follow-up should happen quickly, in the right way (individual communication, e-mail, etc.). Some companies send out regular updates after certain meetings, or keep meeting notes in a publicly accessible location, to demonstrate transparency and keep people informed.

Virtual Meetings

The principles for effective in-person meetings apply to those conducted virtually, but virtual meetings require stronger facilitation, formality, and preparation. Participants may need to say their name before speaking, and the facilitator may need to call on individuals by name for their contributions.

While insufficient in itself, good technology is necessary: Good speaker phones, working computer cameras, and electronic screen-shares (serving as a flipchart) can make it easier for people to hear, see, and focus during the meeting. Tools like breakout rooms or texting software can increase participation.

Practice and Improve

We sometimes assume that managers, committee chairs, and task force leaders automatically know how to run an effective meeting. People often are thrown into these roles, without formal training, and often with mediocre role models. We would never accept the same poor preparation in financial, operational, or other key processes.

No wonder meetings have such a bad reputation.

Leading effective meetings is a skill that is developed over time. Pay attention to how effective leaders run their meetings. Borrow their techniques. There are plenty of resources on the Internet for helpful facilitation exercises. Practice a lot, and always get feedback afterward.

Making small changes in your company's meetings can make a big difference in tapping into the benefits of employee ownership. Done effectively, meetings help employees truly think, feel, and act like owners.

This article was reviewed and approved by the Chair of the Ownership Culture Committee, Jason Wellman, Senior Relationship Consultant, ESOP Partners. 

Calendar of Deadlines and Important Dates

Sept. 23	Early Bird Registration Ends for Employee Owned 2019
Oct. 1-31	Employee Ownership Month
Nov. 13-15	Employee Owned 2019, the Conference and Trade Show for ESOPs
Dec. 1-4	Leading in an Ownership Setting

To see the full list of ESOP Association meetings, visit us online at: www.esopassociation.org.

New Trade Show Offers New Experience

Innovation Stage with Special Content and Other Great Features Will Make this Year's Trade Show an Experience to Remember

This year's Trade Show will be like nothing you've seen before, with special features designed to draw crowds of energized and engaged attendees. Take a look at some of the features that are new this year.

Innovation Stage

The Innovation Stage will be the heart of the Trade Show and will attract attendees with up to nine special presentations, offered throughout the conference.

Trade Show exhibitors can apply for an one or more of the Innovation Stage's exclusive speaking slots. This is a prime opportunity to show ESOP company leaders the wealth of knowledge and expertise you can offer! Your presentation also gains the branding and reach of being simultaneously live-streamed on our Facebook page. Contact us for more information.

A Cup o' Joe

Our attendees love coffee breaks, and the Trade Show will feature a new way for them to get the between-session caffeine they crave. Each attendee will receive a ticket for a free cup of specialty coffee—and the chance to buy more—at our exclusively branded station in the Trade Show.

Interested in sponsoring this station? Let us know.

A Cup of Suds

New this year, our Trade Show will offer attendees a chance to sit back and sip a brew from an ESOP brewery. As with our coffee station, attendees will receive a ticket for one free cup—and the chance to buy more, if they wish.

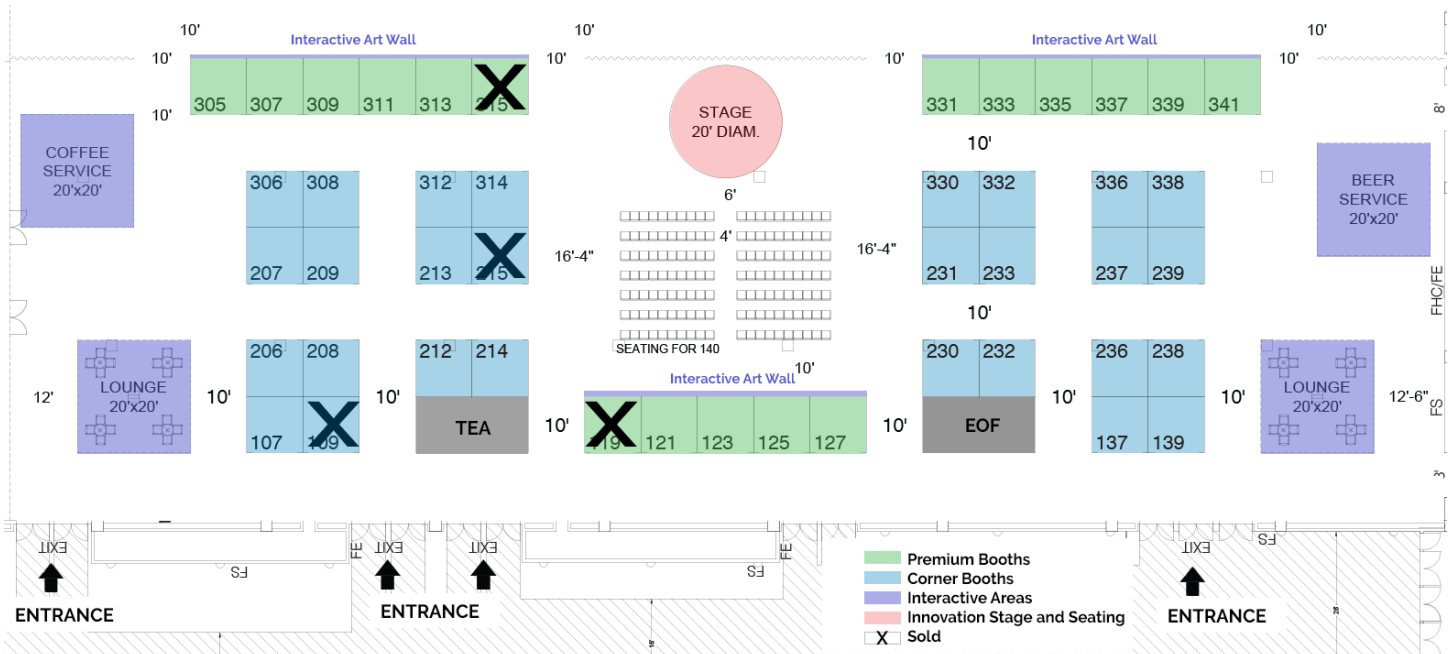
Sponsorship opportunities for this station are available.

New Layout

Not only are there exciting attractions to draw attendees into this year's Trade Show, the layout of this space means every seat in the house is in a prime location.

- With the Innovation Stage attracting attendees, every booth around the stage is prime real estate.
- Premium booths are placed in high-traffic areas and have special eight-foot high back walls featuring conference branded graphics designed to draw attendees' attention.
- The strategically placed beer and coffee stations ensure that traffic will flow to every nook and cranny of the Trade Show—and to every booth within it.
- Smaller clusters of booths create a better traffic flow and mean that almost every booth is a corner booth!

For more information visit our [website](#) or e-mail [Maya Van Buren](#).



Legal Update

Potential Prohibited Transaction Concerns in Private Settlements

By Allison Wilkerson, Partner, McDermott Will & Emery

Edited by Julie Govreau, Senior Vice President and Chief Legal Counsel, Greatbanc Trust Company, Lisle, IL

As private plaintiff causes of action rise and as fiduciaries seek recompense outside of the expensive and time consuming court system, it may be prudent to undertake the formality of complying with Prohibited Transaction Exemption 2003-29 (PTE 2003-29).

Doing so could avoid later claims that your business engaged in a prohibited transaction. Such claims could expose the fiduciary to further liability—perhaps without the ability to bring in an original bad acting party who has received a release of claims from the retirement plan in question.

Is a Settlement a Plan Asset?

On December 24, 2003 the Department of Labor issued PTE 2003-29, providing an exemption from certain prohibited transaction restrictions that may be imposed by ERISA on a plan seeking to settle litigation. Without making a determination that the settlement of a claim is in fact the release of a plan asset, the DOL asserts that PTE 2003-29 was designed to provide some certainty as to actions that may be taken when a fiduciary seeks to settle litigation.

The general premise behind PTE 2003-29 appears to be that certain causes of action that may be brought by, or on behalf of, a qualified retirement plan for damages may in fact be assets of the plan. To the extent that a settlement of such action releases a party in interest from further liability, this release or settlement may constitute a prohibited transaction.

That is, if a retirement plan has the right to sue the trustee and wishes to settle such claim with the trustee, the plan may be viewed as selling an asset (the right to future claims/monetary damages) for the benefit of a party in interest (the trustee).

Absent certain protections, this action would run afoul of the ERISA standards prohibiting sales of assets among a plan and a party in interest. PTE 2003-29 provides a fiduciary with a road map to determine the appropriateness of accepting a settlement without exposing the fiduciary to further scrutiny under these rules.

Why PTE 2003-29 May Not Have Been Popular

The requirements of the exemption do not appear to have been an area of significant focus by ESOP fiduciaries in

recent years. One reason may be that the exemption does not to appear to be necessary (or even really applicable) in instances where the DOL approves a settlement. The DOL generally would be the regulatory authority asserting a prohibited transaction; if the DOL agrees with the settlement, the matter is closed.

ERISA Section 502(h) provides that the DOL must receive a copy of all private rights of actions brought by a participant, beneficiary, or fiduciary and the Secretary has the right to intervene in such actions. The DOL has, on a number of occasions, joined private plaintiff litigation involving ESOPs, so final settlement in such events is approved by the DOL. In such instances, the PTE is unnecessary.

However, the DOL may be reticent to join litigation where plaintiff's counsel appears well suited to the case or the cause of action is for a low dollar amount. Government resources are limited and it seems the DOL may be happy to allow plaintiffs to take the laboring oar in these matters.

In these situations, a settling party in interest could find itself facing later scrutiny as to any settlement decision, and facing potential liability for a prohibited transaction to the extent the DOL ultimately decided the release of claims/settlement was inappropriate.

Compliance with PTE 2003-29


Compliance with PTE 2003-29 can provide a useful tool in reviewing a proposed settlement for protection against a later claim of engagement in a prohibited transaction. Requirements generally include:

- There must be a genuine controversy involving the ESOP.
- The fiduciary approving the settlement must be independent, have no relationship to any of the parties involved in the litigation, and acknowledge status as a fiduciary *with respect to settlement*. Noteworthy, to the extent the ESOP trustee has been made a party to the litigation, the ESOP trustee—even if otherwise an independent fiduciary—is *not* independent for PTE 2003-29.
- While a fiduciary is not required to negotiate the settlement and may, instead, simply review the requirements, the fiduciary *must* make an affirmative decision to accept or reject the proposal. Passive acquiescence will not meet the standard.

- The settlement must be reasonable and consider the likelihood of full recovery, the risks and costs of litigation, and the value of foregone claims.
- The terms of the settlement must be no less favorable to the ESOP than comparable arms-length terms and conditions would have been if agreed to by unrelated parties under similar circumstances.
- There may not be any evidence of collusion in favor of a party in interest.
- The settlement must be included in a written agreement or consent decree.
- Special rules must be abided by for acceptance of noncash recoveries.

- Record retention requirements must be met for a period of six years.
- Certain other requirements must be included if the settlement includes an extension of credit.

Summary

To the extent that a claim for damages or relief might be a plan asset, fiduciaries would be well advised to educate themselves on PTE 2003-29. Under the analysis above, litigation settlements—and releases of claims negotiated between a fiduciary and other party in advance of litigation—could potentially be considered plan assets. 

Advisory Committee on Administration

Counting Employees and Determining Employee Eligibility

By John Stone, Findley

Reviewed by Vicki Graft, Swerdlin & Company, and Lynn Archer, GreatBanc Trust Company

When designing an ESOP or collecting data for an annual ESOP allocation, there are two significant issues businesses should consider: which employees must be considered for eligibility and allocation purposes, and whether the ESOP will pass the coverage testing required to remain a qualified plan. These issues can get complicated depending on the corporate structure and the different types of employee owners at the firm.

A Brief Primer on Coverage Testing

Like all qualified retirement plans, an ESOP must comply with the minimum coverage requirements of Internal Revenue Code Section 410(b). The details of what it takes to meet minimum coverage requirement are beyond the scope of this article, but the most important thing to know is that a plan needs to cover a significant ratio of non-highly compensated employees (NHCEs) to highly compensated employees (HCEs) as defined by the Internal Revenue Code.

The Code does not require that an ESOP cover every employee. Some employees are considered “statutory exclusions” because the Code specifically provides for them to be excluded from minimum coverage testing. Other groups of employees that we will call “reasonable classification exclusions” may be excluded if doing so does not cause the plan to fail coverage requirements.

Statutory exclusions include employees who:

- Have not met the plan’s minimum age and service requirements (typically age 21 and one year of service).
- Are covered by a collective bargaining agreement.
- Are non-resident aliens without U.S. sources of income.

Many employers have a group of employees they want to exclude from their ESOP for one reason or another. As long as the employee classification has a reasonable business purpose and the exclusion does not cause the plan to fail minimum coverage requirements, the exclusion will work.

Some reasonable classifications are specific to a particular business. Examples of this would be an airline plan that excludes pilots, or a food service company that excludes truck drivers. Additionally, there are some classifications that any employer might want to consider excluding; some of those employee classifications are discussed later in this article.

Another factor that complicates coverage testing is the business’ corporate structure. The important thing to know is that if the ESOP plan sponsor is part of a larger group of commonly controlled corporations, it will be necessary to have information about employees of each entity to complete the coverage testing. After reviewing appropriate plan data, corporate structure, and census information it may be possible to separate out different entities, but your ESOP record-keeper or consultant is going to need all information about your corporate structure and payroll data from all related entities to properly complete coverage testing for each plan year.

Employee Classifications to Consider Excluding

Long-term Leased Employees. A leased employee receives a paycheck from one employer (such as an employee leasing or staffing organization) but performs services for another company (a recipient company).

Keep in mind that many employees hired through a leasing organization may not have attained age 21 or completed one year of service, and those employees can be statutorily excluded from the plan without impacting any coverage tests.

Often plan sponsors will want to exclude leased employees from their ESOP, if that can be done without causing the plan to fail minimum coverage requirements. A leased employee generally is considered the common law employee of the recipient company and therefore is included for minimum coverage testing if each of the following exists:

- The worker was hired pursuant to an agreement between the recipient company and the leasing organization.
- The worker performs services under the direction of the recipient company.
- The person works on a substantially full-time basis for at least one year. IRS guidance provided in Publication 7003 states that individuals are considered substantially full-time employees if they work 1,500 hours during a 12-consecutive month period, or work at least 75 percent of the average number of hours that are customarily worked by an employee of that recipient in that position.

There is a little used safe harbor exception under Code Section 414(n)(5) that would allow leased employees to be treated as employees of the leasing organization if the leased employees do not make up more than 20 percent of the recipient company's non-highly compensated work force, and if the employees are provided a substantial retirement plan through the leasing organization.

Part-time, Temporary, and Seasonal Employees. Many plan sponsors will want to exclude from ESOP participation those employees who are part-time, temporary, or seasonal. Typically, these employees can be excluded, with one significant caveat: The IRS requires the exclusion be written in such a way that if any of these employees works 1,000 hours in a plan year or in the initial 12 month period of employment, they must be allowed to enter the plan.

Employers that have part-time, temporary, or seasonal employees who routinely work more than 1,000 hours will not be able to use this exclusion in those situations.

Shared Employees. A shared employee is someone employed by more than one employer as part of a larger employment arrangement. This might occur when an employee works for two different members of a controlled group of employers, but it also might happen in a joint venture between two employers that are not part of the same controlled group.

The employer needs to be careful in this situation for any qualified plan, but this is especially true for ESOPs because of employer stock rules. Providing benefits for compensation that was not related to the employer could threaten the qualification of the ESOP.

Independent Contractors. An independent contractor performs services for a company in a non-employee capacity. The IRS identifies 20 factors in Revenue Ruling 87-41 to determine if a worker is an independent contractor. Administrator interpretation No. 2015-1 describes the Department of Labor's Wage and Hour Division analysis for determining if an individual is an employee or independent contractor.

There is no reason to exclude independent contractors from participation in a qualified plan because if the person really is an independent contractor, then that person cannot legally participate. A qualified plan is meant to provide benefits only to employees, not independent contractors.

Nevertheless, we often see language excluding from participation those individuals the employer classifies as independent contractors. This language is meant to provide some degree of insurance if a court or government agency were to later determine these independent contractors were instead employees, and hopefully would prevent the employer from needing to go back and make up missed contributions. There still could be coverage test issues related to these prior years if someone is reclassified as an employee.

Expatriates or Abroad Employees. Expatriates are United States citizens working abroad. Typically, these individuals work for a foreign subsidiary of an American company. If the ESOP plan sponsor wants to cover the expatriate, then the subsidiary that pays the expatriate should be added as a participating employer of the ESOP.

If the subsidiary participates in the ESOP, the employee would be in the ESOP, unless otherwise excluded by the plan document. Expatriates who are paid by an employer that does not participate in the plan would be included in coverage testing but would not benefit in the ESOP.

Expatriates can create complexities for any qualified plan. For example, if the expatriate is paid in a foreign currency, his compensation must be converted to U.S. dollars to determine eligible compensation or to determine any Highly Compensated Employee (HCE) status. Also, some foreign countries have required pension contributions, and an employer might want to consider that before committing to making an ESOP contribution on behalf of employees working abroad.

H-2 Visa Employees. The H-2 visa non-immigrant program permits employers to hire foreign workers to temporarily work in the United States to fill some specific need.

The H-2A program applies to seasonal migrant farm workers.

The H-2B program covers non-agricultural work and is good for up to one year; it can be renewed to extend over a three-year period.

Because these folks are in the U.S. for more than 31 days, they are not considered non-resident aliens and therefore cannot be statutorily excluded from a qualified plan (unless they fall below the age and service requirements).


Nevertheless, the temporary nature of these workers means most employers will want to consider excluding the group from participation in the qualified plan, if this can be done without failing coverage testing. Another reason employers may seek to exclude these employees is that making qualified plan distributions to guest workers who have returned to their home country has many complicated tax implications.

In Perspective

For ESOP coverage and compliance testing purposes, it is important for plan sponsors to consider the various types of employees the organization has employed during the year. ESOP plan sponsors should work with their record-keepers,

consultants, and legal counsel to ensure the plan is covering the employee groups it is legally obligated to cover under the terms of the plan document and the Code, and that it is excluding only the employee groups it should be excluding.

Also, make sure your record-keeper, consultant, and other advisors are aware of your corporate structure and have all the payroll and census data they need to properly perform coverage testing for your plan. It can be very expensive to fix mistakes relating to eligibility determination and minimum coverage failures after they have occurred.

This article was reviewed and approved by the Chair of the Administration Advisory Committee, Dolores Lawrence, Managing Director at Blue Ridge ESOP Associates. 

Gwenn Rosenthal Retires from TEA

Association Bids Fond Farewell to Stalwart Employee, Good Friend

Gwenn Rosenthal, the Vice President of Administration for The ESOP Association and a valued member of the staff for nearly 30, years retired from the organization on July 31.

Gwenn joined the staff in 1991 and her importance to the organization grew exponentially over time as she took on roles that were increasingly varied and vital.

By the end of her tenure, Gwenn managed many aspects of the ESOP PAC, including setting up and ensuring the smooth operation of PAC events—such as the annual PAC Breakfast at the National Conference in Washington DC.

When the Employee Ownership Foundation sprang to life, Gwenn took on key roles there as well, managing donations and playing a role in fundraising. At ESOP Association conferences on both coasts—in Washington, DC in May and in Las Vegas in November—Gwenn’s smiling face was ready to greet members and tell them about the benefits of donating to the Foundation and supporting its academic research efforts.

Gwenn seemed to derive particular joy from working with designers to create new and eye-catching Foundation booths for members to visit.

Behind the scenes, Gwenn played a key role in events such as our annual awards banquet. She worked tirelessly to order awards, such as the classic crystal obelisk given to winners of the Annual Award for Communication Excellence (AACE). And at every award ceremony, Gwenn was there to ensure the awards were handled carefully and were given to the right winner at just the right moment.

As the Vice President of Administration, she was the person who made everything run. She contracted with and managed vendors for tasks great and small—from the computer systems, to maintenance in the TEA offices.

One of Gwenn’s more notable achievements took place in January 2016. The owner of TEA’s old office building planned to raze and rebuild the structure, and The Association had a hard deadline for finding new digs. Gwenn put in considerable time and effort to find a new




location and to ensure everything was in place for our move.

Days before our move, a record-breaking snowstorm threatened. The race was on, and it quickly became clear the storm would arrive at our doorstep before the moving vans.

Then Gwenn stepped in.

Although undoubtedly fatigued from the extra effort of picking and setting up our new office, she placed calls, pulled strings, and

made magic happen: We moved a day early and were safely heading home hours before a blizzard dumped more than 29 inches of snow, crippling the city.

The ESOP Association staff recalled that and many of Gwenn’s other accomplishments during a celebratory lunch on her last day at TEA. In thanks, the organization gave Gwenn a crystal obelisk—identical to the many AACE awards she so carefully guarded over the years. It seemed only fitting. 



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Want the *ESOP Report* by e-mail? Send your name, company info, and email address to: media@esopassociation.org

Economic Performance Survey to Launch in September

Check Your E-mail for an Invitation to Participate

The annual Economic Performance Survey—an important opportunity to gather information about the performance of ESOP companies and to share it with the broader public—will be open from Sept. 5 - 27. Invitations to participate in the survey will be e-mailed to the corporate contact for all Corporate Members.

Please keep an eye out for the e-mail and participate when it arrives. The results from this survey have become increasingly popular with the media and the stories we can tell from these data help those outside

our community get a better understanding for how employee ownership benefits companies, individuals, and communities.

Participating is easy and takes only a few minutes. Plus, those who participate get an early release of the results!

The survey is sponsored by the Employee Ownership Foundation, which is dedicated to researching and providing education about employee ownership. The Foundation is an affiliate organization of The ESOP Association.